

FEDERAL CIRCUIT COURT OF AUSTRALIA

SINGH v MINISTER FOR IMMIGRATION & ANOR

[2017] FCCA 2198

Catchwords:

MIGRATION – Administrative Appeals Tribunal – application for a Temporary Business Entry (Class UC) visa – the adverse findings by the Tribunal were clearly open and cannot be said to lack an evident and intelligible justification – the adverse finding by the Tribunal was open in relation to finding that the applicant did not meet the requirements of cl.4020(1) – no jurisdictional error identified – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.97, 476

Migration Regulations, cl.4020 of Schedule 4

Applicant:

PRABHJOT SINGH

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

SYG 801 of 2017

Judgment of:

Judge Street

Hearing date:

11 September 2017

Date of Last Submission:

11 September 2017

Delivered at:

Sydney

Delivered on:

11 September 2017

REPRESENTATION

Solicitors for the Applicant: Mr M E Arch
Concordia Pacific

Counsel for the Respondents: Mr T Reilly

Solicitors for the Respondents: MinterEllison

ORDERS

- (1) The application is dismissed.
- (2) The applicant pay the first respondent's costs fixed in the amount of \$5,600.00.
- (3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 801 of 2017

PRABHJOT SINGH

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) ("the Migration Act") in respect of a decision of the Administrative Appeals Tribunal ("the Tribunal") made on 16 February 2017 affirming a decision of the delegate not to grant the applicant a Temporary Business Entry (Class UC) visa.
2. On 14 July 2015, a delegate found that the applicant failed to meet the criteria for the visa. The delegate found that the applicant had given or caused to be given a bogus document that was false or misleading and that the applicant did not meet Public Interest Criterion (PIC) 4020(1)

(a) of Schedule 4 to the *Migration Regulations 1994* (“the Regulations”). The delegate then found that there were not compelling and compassionate reasons for waiving the criteria.

The Tribunal’s decision

3. The applicant applied for review on 4 August 2015. By letter dated 8 December 2016, the applicant was invited to attend a hearing on 11 January 2017. The applicant appeared on that date to give evidence and present arguments and was assisted by his registered migration agent by telephone.
4. The Tribunal identified the applicant’s background in respect of the visa application and the outcome before the delegate. The Tribunal noted that the applicant appeared before the Tribunal. The Tribunal correctly identified the relevant law in relation to Public Interest Criterion 4020.
5. The Tribunal made reference to the visa application form, giving the details of the most recent English (IELTS) test with a reference number and particular scores. Those scores were all ones which would enable the applicant to meet the IELTS score criteria for the grant of a visa. The applicant’s real scores were ones that would not meet that criteria, which the Tribunal identified in a letter written to the applicant. The applicant acknowledged that the IELTS test report results provided to the Department were altered, but claimed that this was done by his employer’s husband without the applicant’s knowledge.
6. The delegate found the applicant had provided to the Department a document that was considered to be bogus, or information that was considered to be false or misleading, being an IELTS test result report.
7. The Tribunal noted that the applicant confirmed that his brother-in-law had altered the IELTS test report results. The Tribunal asked why if his brother-in-law did not want the applicant to be granted the visa in Australia, his brother-in-law would have altered the IELTS tests by giving the applicant a higher score than the score he actually achieved.
8. The Tribunal noted that the applicant did not dispute the IELTS test report results provided with the visa application was altered. The Tribunal identified the nature of the alteration.

9. The Tribunal found the IELTS test report form, for a test undertaken on 7 June 2014 which was provided to the Department by the applicant as part of the application for the Subclass 457 visa had been altered by someone who did not have authority to alter it, or that it was a fraudulent document. The Tribunal found that the applicant had given or caused to be given, to the Minister a bogus document within the meaning of paragraph (b) of the definition of bogus document in s.97 of the Migration Act, because it was either, not genuine and therefore counterfeit, or had been altered by someone who did not have authority to do so.
10. The Tribunal accordingly found that the applicant had given or caused to be given to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa. The Tribunal found that the applicant did not meet the requirements of cl.4020(1) of Schedule 4 to the Regulations.
11. The Tribunal found that cl.4020(2) of Schedule 4 to the Regulations did not apply. The Tribunal turned to the issue of whether or not there were compassionate or compelling circumstances that warrant the waiver of the requirement of cl.4020(1) Schedule 4 to the Regulations. The Tribunal found that there were not compassionate or compelling circumstances in the present case, and concluded that the requirements of cl.4020(1) Schedule 4 to the Regulations should not be waived and affirmed the decision under review.

Before this Court

12. The grounds of the application are as follows:-

Ground 1: The second respondent, the Administrative Appeals Tribunal erred in finding that the applicant had "given, or caused to be given" to the Minister or an officer of the Department a bogus document within the meaning of Public Interest Criterion 4020 of Schedule 4 of the Migration Regulations, namely an allegedly altered or fraudulent IELTS test result report. The Tribunal thus erred in law and committed jurisdictional error.

Particulars

1. The evidence before the Tribunal established that the IEL TS test result report was altered by the applicant's brother-in-law, without the applicant's knowledge, participation or consent.

2. The evidence before the Tribunal established that the applicant's brother-in-law was solely responsible for transmitting the fraudulent IELTS test result report to a migration agent for the purpose of lodging the document with the Department.

3. The evidence before the Tribunal established that the applicant did not have any direct contact with the migration agent in relation to the application.

Ground 2: The Tribunal misinterpreted Public Interest Criterion 4020 and thus erred in law and committed jurisdictional error.

Particulars

1. The Tribunal erroneously concluded that Public Interest Criterion 4020 may be engaged in circumstances where a third party creates a bogus document and arranges for that bogus document to be given to the Department, without the knowledge, participation or consent of the applicant, where the third party engages in such conduct with the specific purpose of undermining the applicant's visa application or otherwise damaging the applicant's legal rights.

2. The Tribunal erroneously concluded that Public Interest Criterion 4020 may be interpreted so as to impose absolute liability on an applicant whenever a bogus document is submitted to the Department, notwithstanding the supervening conduct of a third party acting with ill intent toward the applicant.

3. The Tribunal erroneously concluded that the applicant in these proceedings did not satisfy Public Interest Criterion 4020 even though the evidence before the Tribunal established that the applicant was entirely innocent, and that the responsibility for the creation of the bogus document and the submission of that document to the Department was solely attributable to the misconduct of a third party, being the applicant's brother-in-law

Consideration

13. Ground 1

14. Mr Arch, the solicitor on behalf of the applicant sought to submit that the finding that the document was fraudulent, been altered, or it was

fraudulent and caused to be given to the Minister or an officer of the Department by an applicant was not open and was wrong because the brother-in-law had admitted that he had done it in some moment of vindictiveness to cause the applicant harm.

15. The Tribunal raised with the applicant in the witness box as did the with Mr Arch, the solicitor for the applicant, how it could be that the brother-in-law in this moment of vindictiveness could have improved the score so as to permit the applicant to pass the test.
16. Mr Arch, the solicitor for the applicant, pursued the argument maintaining that there was no evidence to support the finding that the applicant had given or caused to be given the document to the relevant person in relation to the Public Interest Criterion 4020.
17. The Tribunal's reasons clearly took into account the brother-in-law's explanation and the explanation advanced of the employer's husband seeking to be vindictive and identified that the vindictiveness went to improve the score so that the applicant actually passed the test. The adverse findings by the Tribunal were clearly open and cannot be said to lack an evident and intelligible justification. No jurisdictional error as alleged in ground 1 is made out.
18. **Ground 2**
19. Ground 2 in substance seeks to invite this Court to engage in an impermissible merits review. The adverse finding by the Tribunal was open in relation to finding that the applicant did not meet the requirements of cl.4020(1) of Schedule 4 to the Regulations, and it was open to the Tribunal to find that the circumstances were not ones which met the criteria of cl.4020(4) of Schedule 2 to the Regulations.
20. The applicant's solicitor's focus on the purpose of the person undermining the applicant's visa application or otherwise damaging the applicant's legal rights is an odd submission to advance in circumstances where the interference was one to assist the applicant improve his score so that he could meet a criteria he otherwise failed to meet. There is no substance in ground 2. No jurisdictional error as alleged in ground 2 is made out.

Conclusion

21. No jurisdictional error is made out by the application. Accordingly, the application is dismissed.

I certify that the preceding nineteen (19) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 28 September 2017